

STATE OF MICHIGAN
COURT OF APPEALS

LAURA McKILLOP, Personal Representative of
the Estate of MAX G. McKILLOP, II, Deceased,

UNPUBLISHED
January 14, 2003

Plaintiff-Appellant/Cross-Appellee,

and

TERRY L. BIRKENMEIER, Personal
Representative of the Estate of TERRY L.
BIRKENMEIER, II, Deceased,

Plaintiff-Appellant/Cross-Appellee,

v

WILLIAM S. KLEIN, T.J. MAUL
EXCAVATING, INC., and T.J. MAUL
TRUCKING,

No. 233171
Saginaw Circuit Court
LC No. 98-022396

Defendants-Appellees/Cross-
Appellants,

Before: Murray, P.J., and Sawyer and Fitzgerald, JJ.

PER CURIAM.

Plaintiffs Laura McKillop and Terry L. Birkenmeier appeal as of right the entry of a jury verdict finding no cause of action against defendants William S. Klein and T.J. Maul Excavating, Inc. and T.J. Maul Trucking.¹ T.J. Maul cross-appeals the trial court's denial of its motion for summary disposition. Klein cross appeals the trial court's determination that he could not raise an in loco parentis defense. We affirm.

Plaintiffs' first issue on appeal is that testimony about the decedents' ability to follow instructions was improperly admitted. We disagree. The admissibility of evidence is within the

¹ Defendant William S. Klein will be referred to as Klein and T.J. Maul Excavating, Inc. and T.J. Maul Trucking will be referred to as T.J. Maul.

trial court's discretion and is reviewed for abuse of that discretion. *Szymanski v Brown*, 221 Mich App 423, 435; 562 NW2d 212 (1997). An abuse of discretion will be found only when the result is "so palpably and grossly violative of fact and logic that it evidences not the exercise of will but perversity of will, not the exercise of judgment but defiance thereof, not the exercise of reason but rather of passion or bias." *Spalding v Spalding*, 355 Mich 382, 384-385; 94 NW2d 810 (1959).

A child under seven years old is not capable of contributory negligence. *Baker v Alt*, 374 Mich 492, 505; 132 NW2d 614 (1965). However, while a child cannot be held contributorily negligent, the child's "conduct is, of course, admissible as it bears upon the question of whether defendant was guilty of any causal negligence." *Id.* at 505; cf. *Johnson v Koski*, 63 Mich App 167, 173, 175; 234 NW2d 184 (1975) (the defendant affirmatively alleged, and repeatedly referenced, contributory negligence on the part of the six-year-old plaintiff; therefore, evidence of the plaintiff's conduct was confusing for the jury).

In this case, it was not alleged that the boys were contributorily negligent. The questions asked about the boys' ability to follow instructions related to Klein's conduct. Additionally, the jury received instructions that the boys could not be found negligent, and the jury received a verdict form that could only apportion negligence between Klein and T.J. Maul. Jurors are presumed to follow the instructions they were given. *RCO Engineering, Inc v ACR Industries, Inc*, 235 Mich App 48, 64; 597 NW2d 534 (1999), vacated in part on other grounds and remanded 463 Mich 893 (2000), amended 463 Mich 979, on remand 246 Mich App 510 (2001). We find that Klein's knowledge of the boys' previous behavior was relevant to evaluating his conduct.

Plaintiffs' second issue on appeal is that the jury's verdict was against the great weight of the evidence. We disagree. The grant or denial of a motion for a new trial because the jury verdict was against the great weight of the evidence is within the trial court's discretion and is reviewed for abuse of that discretion. *Wilson v General Motors Corp*, 183 Mich App 21, 36; 454 NW2d 405 (1990).

A jury's verdict may only be overturned "when it was manifestly against the clear weight of the evidence." *Ellsworth v Hotel Corp of America*, 236 Mich App 185, 194; 600 NW2d 129 (1999), citation omitted. The trial court cannot substitute its judgment for the jury's, and the jury's verdict should not be set aside if there is competent evidence to support it. *Id.* at 194. This Court will give substantial deference to a trial court's determination that the verdict is not against the great weight of the evidence. *Id.*

To establish a prima facie case of negligence, a plaintiff must demonstrate that (1) the defendant owed a duty to the plaintiff; (2) the defendant breached that duty; (3) the defendant's breach of its duty was the proximate cause of the plaintiff's injury; and (4) the plaintiff suffered damages. *Case v Consumers Power Co*, 463 Mich 1, 6; 615 NW2d 17 (2000). In this case, the jury had to determine whether Klein and T.J. Maul exercised reasonable care, meaning "the care that a reasonably careful person would use under the circumstances." *Id.* at 7. Klein admitted that he let the boys out of his sight; however, he stated that it was for 3 to 5 minutes. When he had last seen them, the boys were playing safely. Regarding T.J. Maul, there was no evidence presented that the boys were left in the care of anyone other than Klein. While the deaths of these two young boys were tragic, we find that reasonable minds could differ on whether Klein and T.J. Maul were negligent; therefore, the trial court's denial of plaintiffs' motion was proper.

In light of our resolution of the above issues, we need not address the issues raised on cross appeal.

Affirmed. Defendants may tax costs.

/s/ Christopher M. Murray

/s/ David H. Sawyer

/s/ E. Thomas Fitzgerald